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## *Are "Click Through" Agreements Enforceable?*

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"Click through" agreements (sometimes called "click and accept" and "web-wrap" agreements) offer companies selling goods and services over the Internet significant protections beyond those afforded by whatever intellectual property rights they may have in their goods and services. "Click through" agreements are frequently used to disclaim implied warranties, limit liability, choose the governing law and forum for resolving disputes, and prohibit reverse engineering. Both business-to-business and business-to-consumer e-shoppers have become quite familiar with screens flashing legal terms and requiring the clicking of an "I accept" button before goods can be ordered, services procured or information accessed.

But are such agreements enforceable? In the United States, since the landmark case of *ProCD v. Zeidenberg*, courts have tended to enforce "shrink-wrap" agreements accompanying packaged computer software, so long as (i) the terms of those agreements are "commercially reasonable" and not otherwise unconscionable or subject to any other defense available under contract law; and (ii) purchasers have the right to reject those terms upon opening the product package and to receive a full refund. (See our [July 1996 Intellectual Property Bulletin](#) for more on the *ProCD v. Zeidenberg* case.) Not surprisingly, courts have gone on to apply similar reasoning in enforcing "click through" agreements in a number of cases, including *Groff v. America Online*.

Potential problems arise when a company, rather than an individual, is entering into a click-through agreement. In this situation, the vendor must be careful to ensure that the individual clicking to accept has authority to accept on behalf of the company. Of particular concern is an employee's ability to bind its employer to non-competition covenants and other contractual provisions affecting goods and services other than the software product then being downloaded, installed or used by that employee.

Internationally, the enforceability of these "click through" agreements is less clear. Although only China appears to refuse to enforce "click through" agreements outright, other countries make enforcement problematic due to a combination of factors, including local language requirements and variations in consumer protection laws. In particular, the European Union's Long Distance Selling Directive gives consumers the right to revoke electronic agreements without cause within seven days from the purchaser's receipt of written confirmation of such agreements (as discussed in our [March 14, 2000 Internet Alert](#)).

On February 18, Ken Slade and Jorge Contreras of Hale and Dorr LLP spoke to the Massachusetts Software & Internet Council on the topic "*Creating Enforceable Click Through End-User Agreements, Both Domestically and Internationally*". Ken and Jorge reviewed the law on enforceability of these agreements (and their predecessor shrink-wrap agreements), recommended a four-step strategy to improve enforcement in the United States, surveyed various special international considerations affecting the enforceability of these agreements, and suggested a three-step process for maximizing the chances of enforcing "click through" agreements in a variety of countries.

Unfortunately, companies offering goods and services electronically over the Internet cannot assume that all of their "click through" contractual terms will be enforced everywhere. However, with advance planning and case-by-case adjustments, those companies can significantly increase their prospects for enforcing most of the terms of those agreements in most major markets.